

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 22, 2009

STATE OF TENNESSEE v. KENNETH KENDELE MOORE

Direct Appeal from the Criminal Court for Hamilton County
Nos. 229188, 229190 & 229191 Don W. Poole, Judge

No. E2009-00647-CCA-R3-CD - Filed December 17, 2009

The Defendant, Kenneth Kendele Moore, pled guilty to possession of cocaine for resale and two counts of misdemeanor assault. The trial court sentenced him to an effective sentence of eight years, eleven months and twenty-nine days to be served on probation. The Defendant's probation officer filed a probation violation warrant, and, after a hearing, the trial court revoked the Defendant's probation and ordered him to serve the remainder of his sentence in the Tennessee Department of Correction. On appeal, the Defendant claims that the trial court abused its discretion by incorrectly applying the law when it denied him a less restrictive alternative to confinement. After a thorough review of the record and the applicable law, we conclude the trial court properly exercised its discretion. Accordingly, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Ardena J. Garth, Chattanooga, Tennessee, for the Appellant, Kenneth Kendele Moore.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Clarence E. Lutz, Assistant Attorney General; William H. Cox, III, District Attorney General; Brian Chapuran, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Background

On January 19, 2000, the Defendant pled guilty to three charges.¹ In case number 229188,

¹It appears from the judgment forms that the Defendant also pled guilty to other charges to which the sentences involved herein were ordered to run consecutively to or concurrently with. Those judgments, however, are not the subject of this appeal. We will, therefore, omit reference to those convictions.

the Defendant pled guilty to possession of cocaine for resale, a class B felony, and the trial court sentenced him to eight years to be served on probation. In case number 229190, the Defendant pled guilty to assault, a class A misdemeanor, and the trial court sentenced him to eleven months, twenty-nine days to be served on probation consecutively to case number 229188. In case number 229191, the Defendant pled guilty to assault, a class A misdemeanor, and the trial court sentenced him to eleven months, twenty-nine days, to be served on probation concurrently with case number 229188.

On June 27, 2003, the Defendant's probation officer filed a probation violation report, alleging that the Defendant had been arrested on October 10, 2002, and March 10, 2003, for resisting arrest, possession of crack cocaine for resale, possession of marijuana for resale, and driving on a revoked license. The trial court issued a *capias* for the Defendant, and then it ordered the Defendant into the Hamilton County Community Corrections Program.

On July 14, 2004, the Community Corrections Officer assigned to the Defendant issued a *capias* request, alleging that the Defendant had tested positive for cocaine on two random drug screens dated June 17, 2004, and June 22, 2004. The *capias* request also alleged that the Defendant had failed two other drug screens, dated July 6, 2004, and July 9, 2004, that were both administered by the alcohol and drug counselor at the Defendant's required drug treatment program. The Community Corrections officer asked that the Defendant be removed from the program. The trial court issued a *capias* for the Defendant's arrest. The trial court then dismissed the revocation.

In another *capias* request dated November 22, 2004, the Defendant's Community Corrections officer alleged that the Defendant had left his "arrest house" multiple times without permission. Then, on November 16, 2004, the Defendant tested positive for cocaine during a random drug screen. Based upon these curfew violations and the positive drug screen, the Community Corrections officer requested that the Defendant be removed from the Community Corrections program. The trial court ordered the Defendant's probation revoked but suspended his sentence on the original conditions of probation.

On April 24, 2006, the Defendant's probation officer filed a probation violation report, alleging that the Defendant had a new arrest and a new conviction. The report asserted that on April 11, 2006, the Defendant had been arrested for resisting arrest, tampering with evidence, and possession of crack cocaine. Further, the report alleged the Defendant had pled guilty on April 18, 2006, to these offenses. The report also indicated that the Defendant had failed to report his new offenses to his probation officer, failed to report for his scheduled visit, and owed money in fees and court costs. The trial court issued a *capias* for the Defendant's arrest.

On July 23, 2008, the Defendant's probation officer filed another probation violation report, alleging that the Defendant had been arrested on July 9, 2008, for possession of marijuana for resale and on May 23, 2008, for possession of a controlled substance, Hydrocodone, and driving on a revoked license.

B. Revocation Hearing

At the hearing on the probation violation report, held March 5, 2009, the following evidence was presented: Terry Steele, a probation officer with the Board of Probation and Parole, testified that he began supervising the Defendant in November 2008 when another probation officer retired. Steele said the Defendant was first placed on intensive probation with Steele's program in February of 2006 but had previously been on regular probation and in the community corrections program since January of 2000.

Steele said that the basis of this hearing was the probation violation report filed July 23, 2008, which alleged that the Defendant had been arrested for possession of marijuana for resale on July 9, 2008, and for possession of a controlled substance and driving on a revoked license on May 23, 2008. Steele recounted that, on September 23, 2008, the Defendant had pled guilty to possession of marijuana for resale and driving on a revoked license, and the charge of possession of a controlled substance was dismissed.

Steele testified that his office had filed probation violation reports on several previous occasions, including one on April 26, 2006, when the Defendant pled guilty to possession of cocaine, and one in 2003 when the Defendant pled guilty to two counts of possession of cocaine for resale and resisting a stop and frisk. Steele said his notes indicated that, on July 14, 2004, the Defendant had also pled guilty to possessing contraband in a penal institution. The current violation report was the fifth one that had been filed against the Defendant. In the previous four instances, the Defendant was returned to some form of probation. Steele added that the Defendant had been charged with twenty-one different offenses on ten different occasions since he began probation in 2000. Those charges included both felonies and misdemeanors.

The Defendant testified he had pled guilty to many of the charges he had received since 2000 because it was in his best interest. In one instance in 2006, he pled guilty to tampering with evidence because the State agreed that the Defendant's probation would not be revoked.

The Defendant said the trial court should give him another chance at probation because he had learned his lesson. He explained that he received this latest driving on a revoked license charge because he had to drive himself to work. He said that, for the last two years, he had paid child support and been employed steadily. The Defendant was sure he could return to his job. He said he had taken parenting classes while incarcerated and was close to receiving a certificate.

On cross-examination, the Defendant agreed that his agreement with the State in 2006 had no bearing on the present proceedings because the current revocation was for driving on a revoked license and possession of marijuana. The Defendant explained that he was arrested for possession of marijuana stemming from a search warrant executed by police at his girlfriend's house, which was not his residence. The Defendant said that the marijuana, which was approximately a ten dollar bag, was not his and was found under the loveseat. He said that he was at the house with his brother and his girlfriend and both denied that the marijuana belonged to them. The Defendant said he accepted responsibility for the drugs because his brother had been employed at the same place for fourteen

years and his girlfriend was in the process of opening a day care.

At the conclusion of the hearing, the trial court revoked the Defendant's probation and ordered him to serve the remainder of his sentence in confinement. It is from this judgment that the Defendant now appeals.

II. Analysis

The Defendant concedes he violated the terms of his probation, but he contends the trial court incorrectly applied the law in determining whether to revoke his probation. He notes that the trial court considered prior revocation proceedings that were not the subject of the present revocation hearing. The State contends that the trial court did not abuse its discretion.

When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. T.C.A. § 40-35-311(e) (2006). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. *State v. Hunter*, 1 S.W.3d 643, 644 (Tenn. 1999); see T.C.A. §§ 40-35-308, -310, -311 (2006). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. T.C.A. § 40-35-311(e). After finding a violation, the trial court is vested with the statutory authority to “revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered” *Id.*; accord *Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension” T.C.A. § 40-35-310 (2006).

The decision to revoke probation is in the sound discretion of the trial judge. *State v. Kendrick*, 178 S.W.3d 734, 738 (Tenn. Crim. App. 2005); *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). This Court will uphold a trial court's judgment to revoke probation unless the trial court abused its discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). To find an abuse of discretion in a probation revocation case, the record must be void of any substantial evidence that would support the trial court's decision that a violation of the conditions of probation occurred. *Id.*; *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980).

In this case, the trial court revoked the Defendant's probation and ordered him to serve the remainder of his sentence in confinement. On appeal, the Defendant concedes he violated his probated sentence. Indeed, the Defendant admitted at his revocation hearing that he had pled guilty to driving on a revoked license and possession of marijuana. As such, substantial evidence supports the trial court's conclusion that the Defendant violated his probation. See *Harkins*, 811 S.W.2d at 82.

The Defendant directs his objection to the trial court's consideration of the fact that the Defendant's probation had been revoked on four prior occasions. When revoking the Defendant's probation, it stated:

[Y]ou are likable. I think you're believable in some ways, but at some point in time, it is just too much.

Now, let me first say, in regard to the petition that's before the Court today, it's that you have violated the terms of your probation Certainly there is no doubt that you have violated the terms of our probation by being arrested and being convicted for two additional offenses while you're on probation.

Now, sir, and certainly if that was the first thing or second thing or third thing or the fourth thing, maybe we could listen to you because you do present yourself in some fashion fairly well, but it's just too much, sir. You've been on supervised, you've been on intensive, you've been on Community Corrections. To say you're going back on intensive probation doesn't mean anything, sir, because you've already flunked it, repeatedly flunked it. And looks like to me that the thing that you presented here, looks like to me that a violation was filed and it was dismissed, so no action was, in fact taken on that, which was the understanding.

And I understand what you and [your counsel] are saying is maybe that you didn't do that and that you accepted it so no violation would be filed. But I got to find by the preponderance of the evidence that you violated your probation. I find that. Like I said, if this had been just a limited number of violations, then I think based upon your testimony, that I would give you a chance, but it appears to me that 21 [charges] in the last eight, nine years, that's two and a half a year, two and a half crimes a year that I don't think you get that many for free Maybe one or something that you weren't convicted or guilty of, but it seems like to me 21 times, and specifically these violations, are just too much.

We conclude the trial court did not abuse its discretion when it revoked the Defendant's sentence and ordered him to confinement. Upon a revocation, the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement. Here, the trial court considered that the Defendant's probation had previously been revoked on four occasions, and each time he was returned to probation. Further, the trial court considered that the Defendant had failed to comply with the requirements of supervised probation, Community Corrections, and intensive probation. Finally, the trial court considered that the Defendant had received twenty one new charges in the nine years he had been on probation. These were all appropriate considerations, and the considerations support the trial court's judgment. As such, the trial court did not abuse its discretion when it ordered the Defendant to serve the remainder of his sentences in confinement. The Defendant is not entitled to relief.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE